IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.64 OF 2007
IN
NOTICE OF MOTION NO.122 OF 2006
IN
TESTAMENTARY SUIT NO.33 OF 2006
(Testamentary Petition No.166 of 2006)

1. Dr. Meherji Aspendiar Oshtori, Of 5, Josephine Apartments, Chimbai Road, Bandra (West), Mumbai Indian Inhabitant at present residing at 2408, Bonnie Brook Dr. Stockton, 95207, U.S.A. through their Constituted Attorney Mr. Devidas Manharlal Dedia residing at 52, Pearl 2, Andheri CHS Ltd., V.P. Road, Andheri (West), Mumbai-400 058.

2. Faraidoon Aspendiar Oshtori D-3, Kadamba Apartments, Dr. Atmaram Borkar Marg, Panaji, Indian Inhabitant At present residing at 6127, Harrisburg PL Stockton, CA 95207, U.S.A., through Their Constituted Attorney Mr. Devidas Manharlal Dedia residing at 52, Pearl 2, Andheri CHS Ltd., V.P. Road, Andheri (West), Mumbai-400 058. .... Appellants

- Versus -

Mr. Kaikhosrow Aspendiar Oshtori of Mumbai, Adult, Indian Inhabitant, Religion Zorastrian, as executor, residing At Flat No.203, Nectar-I, Shirley Rajan Road, Pali Hill, Bandra (W), Mumbai-400 050. .... Respondent

Sarvasri Virag Tulzapurkar with Sandeep Parikh, Hemang Engineer and Ms Deepal J. Thakkar i/b M/s. Gordhandas & Fozdar

for the Appellants.

Sarvasri Sanjay Jain with Rajesh A.
Revankar i/b M/s. A.G. Revankar & Co.
for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: FEBRUARY 12, 2007

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Admit. The learned Advocate for the respondent waives service. By consent, heard forthwith.

2. The appellant challenges the order dated 15-12-2006 passed in Notice of Motion No.122 of 2006 in Testamentary Suit No.33 of 2006 whereby the learned single Judge has held that the caveators/appellants have not challenged the validity and legality of the Will and that therefore are not entitled to maintain the caveat.

3. The learned counsel appearing for the appellants, drawing attention to the observation by the learned single Judge in the impugned order that in a probate petition the only issue that can be raised and decided by the Court is whether the Will is legal and valid, submitted that though there is no quarrel about the said proposition of law, the learned single Judge failed to consider that the appellants had clearly raised the dispute about the legality and validity of the Will in

para 4 of the affidavit in support of the caveat. Attention was drawn to the said para wherein it is stated thus:

> "I say that the Will dated 19-12-2001, in respect of the Probate is applied for under the aforesaid Petition is invalid, illegal and fraudulently prepared and not enforceable in law."

The learned counsel further submitted that the submission in para 4 of the affidavit in support of the caveat clearly discloses that the appellant had raised dispute about the legality and validity of the Will. It is difficult to accept this contention. The contents of para 4 of the affidavit reproduced above do not disclose any statement of fact. The same do not disclose particulars of fraud or the grounds on which the Will is sought to be alleged as invalid or illegal.

4. Perusal of the impugned order discloses that after referring to the said para, the learned single Judge in that regard has observed that the affidavit in support of the caveat, apart from making the said submission, nowhere discloses any factual matrix which could help the Court to decide the issue regarding the legality and validity of the Will. Indeed, mere submission that the

Will is invalid, illegal and fraudulently prepared and not enforceable in law, would not be sufficient to raise the dispute regarding the legality and validity of the Will. For the purpose of consideration of issue regarding the legality and validity of a Will, it is necessary for the caveator to disclose the basic facts which could lead to the conclusion about the illegality or invalidity of the Will. Undisputedly, the affidavit in support of the caveat does not disclose any such fact which could reveal the Will to have been obtained fraudulently or the Will to be invalid or illegal. Being so, no fault can be found with the impugned order wherein it has been held by the learned single Judge that the caveators, apart from making mere submission, have not actually disputed that the Will was duly signed and attested and that the attestor was in the right frame of mind to make the Will.

5. The affidavit in support of the caveat also discloses that after the death of the attestor, a meeting was held of five persons wherein a memorandum of understanding was arrived at. While disclosing this fact, the affidavit nowhere states that the cause for execution of any such memorandum was the Will to be illegal or invalid. It also does not mention that the memorandum was prepared on account of alleged fraudulent preparation of the Will or that the Will was not

enforceable in law. In these circumstances, in our considered opinion, no fault can be found with the impugned order.

6. In fact, the rules of pleadings as enumerated under the C.P.C. are applicable to the proceedings in question. Whenever the contention relates to fraud or undue influence or breach of trust, the party alleging the same has to reveal all the particulars based on which such a plea is sought to be raised. The party would be entitled to pursue its plea only on the basis of those particulars, without introducing any new particulars as such. That the Will stands vitiated on account of fraud having been played in obtaining the same is merely a contention which is required to be based on the particulars to be disclosed to substantiate such contention.

7. The learned counsel, however, is justified in contending that the learned single Judge was not required to go into the other issues regarding the acceptance or non-acceptance of the Will while deciding about the maintainability of the caveat. According to us, the observations in that regard have been made only to reveal that the affidavit in support of the caveat does not disclose any factual matrix in support of the contention about the Will being invalid or illegal or

having been fraudulently prepared.

8. With the above observations, the appeal is dismissed. No order as to costs.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

sjs/f7aj64.7